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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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MAY 26 1998

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	

PETITION FOR LIMITED RECONSIDERATION AND/OR FORBEARANCE OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PRIMECO PERSONAL COMMUNICATIONS, L.P.

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Table of Contents

Page

Summary i

Argument 2

I. The Commission Should Reconsider Rules 64.2005(b)(1) and (b)(3) as Applied to CMRS Providers 2

A. Customers Expect CMRS Providers to Use CPNI to Advise Them of New Mobility Packages, Including Packages Containing Handsets and Voice Mail and Other Information Services 3

1. CMRS Handsets. 4

2. Voice Mail and Other Information Services. 6

B. The "Win Back" Prohibition Will Stifle Competition to the Detriment of Consumers and the Overarching Goal of the 1996 Act to Lower Prices 9

II. Alternatively, the Commission Should Forbear from Applying the Handset/ Information Service and Win Back Prohibition Rules to CMRS Providers 11

A. The Commission Should Forbear from Applying Rule 64.2005(b)(1) to CMRS Providers 12

1. Section 10(a)(1). 12

2. Section 10(a)(2). 13

3. Section 10(a)(3). 14

B. The Commission Should Forbear from Applying Rule 64.2005(b)(3) to CMRS Providers 15

1. Section 10(a)(1). 15

2. Section 10(a)(2). 15

3. Section 10(a)(3). 15

Conclusion 16

Summary

PrimeCo agrees with much of the *CPNI Order*. Specifically, it agrees with the Commission's decision to use a "total service approach" in implementing Section 222 of the Communications Act[1] and, in this regard, agrees that at this time CMRS remains a "separate service offering" *vis-a-vis* landline-based services.[2] PrimeCo further agrees that this total service approach permits carriers to use CPNI to market offerings "related to" the customer's existing service:[3]

> Congress recognized though sections 222(c)(1)(A) and (B) that customers expect that carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service.[4]

Finally, PrimeCo agrees with the standard that the Commission adopted for determining what is, and is not, a "related" service offering: "Congress intended that implied customer approval be restricted solely to what customers reasonably understand their telecommunications service to include."[5]

Where PrimeCo *disagrees* with the Commission is in its application of this "customer perception" standard to the unique CMRS market. PrimeCo's dealings with consumers confirms that customers perceive that *all* offerings of a CMRS provider are designed to meet their core need for mobility — "anytime, anywhere" communications — *regardless* of the regulatory classifications attached to each component of the service. For example, a CMRS handset is an essential component of a Title III radio service; not only are handsets essential to service provision, but consumers must have the "correct" handset (capable of operating at the proper frequency and air interface) which, even then, the carrier must program for service initiation. Similarly, for many CMRS subscribers, "information" services such as voice mail are an essential component to their mobility service — more so than many of the so-called "adjunct-to-basic" services which the Commission has confirmed may be used with CPNI. Consumers want, and expect, CMRS providers to use CPNI to advise them of service offerings that may help them either to meet their mobility needs better or to reduce the prices they pay for service. Indeed, this is evidenced by the fact that many CMRS offerings bundle handsets and/or voice mail as part of a single consumer package.

The governing statute, Section 222(c)(1), permits a CMRS provider to use CPNI in two circumstances: "in its provision of (A) the telecommunications service from which such

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1 *See, e.g., CPNI Order* at 20 ¶ 24, 24 ¶ 31.

2 *Id.* at 31 ¶ 40.

3 *See, e.g., id.* at 6 ¶ 4, 28 ¶ 35.

4 *Id.* at 42 ¶ 54.

5 *Id.* at 20 ¶ 24.

information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service."[6] In interpreting clause A, the Commission correctly recognized that CMRS is a different service from the services provided by landline carriers. However, for purposes of applying clause B, the Commission failed to make the same wireless/landline distinction and, in the process, failed to acknowledge that consumers have different expectations concerning CMRS than they do regarding landline services.

There is no indication in the language or legislative history of Section 222 to suggest that Congress intended to dismantle long-standing — and very successful — CMRS marketing programs. The Commission interpreted clause B more narrowly than the statute requires and this interpretation has the unintended effect of inhibiting the core principle underlying the 1996 Act: the promotion of consumer choice and lower prices. Further, even if the Commission decides that reconsideration is inappropriate, it should exercise its statutory forbearance powers to exempt application of Rules 64.2005(b)(1) and (3) to CMRS providers.

The statute expressly permits use of CPNI within the context of the CMRS customer/carrier relationship, and the selective carrier use of CPNI can be a powerful tool benefitting CMRS subscribers. The prudent use of CPNI benefits consumers because it can reduce a carrier's marketing expense — because CMRS providers can target new offerings to selected customers rather than marketing their diverse offerings indiscriminately to all customers. In addition, by using CPNI, CMRS providers can tailor a particular offering to a select group of customers with similar needs and, in the process, can avoid needlessly contacting consumers who would have little or no interest in the particular service offering. Finally, and importantly, use of CPNI enables CMRS providers to treat their customers as individuals. While PrimeCo's customers share a common need of mobility, their respective mobility requirements are tremendously diverse. The selective use of CPNI therefore enables CMRS providers like PrimeCo to design and tailor specific service packages which meet the unique needs of each customer.

One final comment is in order. It appears the Commission fashioned its CPNI rules in part based on its perception of inhibiting incumbent advantages.[7] As a new CMRS entrant, PrimeCo submits that, in this instance, more important to *all* CMRS carriers, incumbent and new entrant alike, is the need to service fully the needs of existing customers. In this respect, PrimeCo is concerned about the impact the two new CPNI rules will have on the ability to meet the needs of its current, and future customer base.

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6 47 U.S.C. § 222(c)(1).

7 *See, e.g., CPNI Order* at 60 ¶ 75 ("[I]ncluding information services within the scope of section 222(c)(1)(B) may give an unfair competitive advantage to incumbent carriers.").

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PETITION FOR LIMITED RECONSIDERATION AND/OR FORBEARANCE OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo Personal Communications, L.P. ("PrimeCo"), an A/B block broadband PCS licensee,[1] petitions the Commission to reconsider two customer proprietary network information ("CPNI") rules adopted in the *CPNI Order*.[2] Specifically, PrimeCo seeks Commission reconsideration of Rules 64.2005(b)(1) and 64.2005(b)(3) insofar as they apply to the provision of commercial mobile radio services ("CMRS").[3] As discussed below, these two

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1 PrimeCo is the licensee or its the general partner/majority owner in the licensee in the following 11 MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami, and Honolulu.

2 *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, *Second Report and Order,* FCC 98-27 (Feb. 26, 1998)("*CPNI Order*"). A summary of this *Order* and the new CPNI rules were published in the Federal Register on April 24, 1998. *See* 63 Fed. Reg. 20236 (April 24, 1998).

3 CTIA has petitioned the Commission to exercise its discretion by deferring the effective date of these rules. *See Public Notice*, "Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification," DA 98-636 (May 1, 1998); CTIA, Request for Deferral and Clarification, at 41-43 (April 24, 1998). Although the Common Carrier Bureau last week clarified the *CPNI Order,* it did not address the

(continued...)

rules would change the current — and prevalent — marketing practices in the CMRS industry to the detriment of competition and consumer interests.

Should the Commission decline to reconsider its *CPNI Order,* however, PrimeCo asks the Commission to exercise its authority under Sections 10 and 332 of the Communications Act to forbear from applying these two Rules to CMRS providers.[4] As discussed herein, the challenged regulation is unnecessary because CMRS subscribers have competitive choices in their service provider and because CMRS providers have a compelling financial self interest in protecting and using properly customer CPNI. The past unregulated regime has worked, as evidenced by the dramatic growth in CMRS subscribership and the absence of consumer complaints that CMRS providers have misused their CPNI. Application of the new rules in question will increase the costs of CMRS service and will inhibit CMRS providers from using CPNI to market a package of services designed to meet the unique needs of *each* individual.

Argument

I. The Commission Should Reconsider Rules 64.2005(b)(1) and (b)(3) as Applied to CMRS Providers

PrimeCo requests the Commission to reconsider two of its new CPNI rules as applied to CMRS providers: (a) Rule 64.2005(b)(1) which prohibits use of CPNI in the marketing of CMRS handsets and CMRS information services, such as voice mail; and (b) Rule 64.2005(b)(3), which prohibits a CMRS provider from using CPNI to regain a former customer who has switched to another CMRS provider.

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3 (...continued)
request for deferral. *See CPNI Clarification Order,* DA 98-971 (May 21, 1998).

4 *See* 47 U.S.C. §§ 10(a) and 332(c)(1)(A).

A. Customers Expect CMRS Providers to Use CPNI to Advise Them of New Mobility Packages, Including Packages Containing Handsets and Voice Mail and Other Information Services

The Commission has determined that Section 222 permits carriers to market offerings which are not currently used by a customer, but which are "related to" the customer's existing service.[5] The Commission further determined that what is or is not related will be evaluated by customer expectations.[6]

CMRS customers expect their carrier will advise them of new mobility products that will either meet their mobility needs better or reduce their cost of service. For example, some CMRS subscribers want to know about new handsets that contain more features, have a longer battery life, are smaller, or are more inexpensive. Similarly, customers expect their carrier will advise them of voice mail and similar products that will enable them to use their mobility service more efficiently. And, where CPNI becomes important, customers expect their CMRS provider will advise them of specific service offerings that will be useful to *them* — *not* offerings which the carrier should know a customer would have little interest.[7]

Last week the Common Carrier Bureau confirmed that CMRS providers may continue to market handsets and information services to customers already purchasing these services.[8] However, the Bureau further confirmed that CMRS providers may not use CPNI to

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5 *CPNI Order* at 6 ¶ 4 and 28 ¶ 35.

6 *Id.* at 49 ¶ 54.

7 For example, a customer purchasing an inexpensive monthly plan for personal safety reasons generally would have little interest in handsets with a robust set of features or in ancillary offerings such as voice mail or caller ID. Conversely, a customer making extensive use of CMRS may have a keen interest in these type of capabilities.

8 *See CPNI Clarification Order,* CC Docket No. 96-115, DA 98-971, at 4-5 ¶¶ 4-5 (May

(continued...)

market handsets and information services to customers not already purchasing these services — *consumers who may most benefit by permitting CMRS providers to maintain their current practices*.[9]

The Commission based its decision upon its interpretation of Section 222(c)(1). PrimeCo submits that the Commission has applied Section 222 in a manner that is not required by the statute and that undermines both the core objective of the 1996 Act and customer expectations.

1. CMRS Handsets. The Commission has held that carriers may not use CPNI in the marketing of CMRS handsets to consumers not purchasing or leasing handsets from them because handsets have traditionally been considered by regulators as equipment rather than services, and the statute specifies that CPNI may be used to sell related "services," the Commission stating:

> We . . . find no basis to extent the exception in section 222 (c)(1)(B) to include equipment, even if it may be "used in" the provision of a telecommunications service.[10]

PrimeCo submits that Congress did not intend the Commission to interpret the word "services" so narrowly, and even the Commission has recognized that the statute does not absolutely prohibit the use of CPNI in the marketing of CMRS handsets and other CPE:

> It . . . may be appropriate in the future for use to examine whether the public interest would be better served if carriers were able to

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8 (...continued)
21, 1998).

9 *See id.* at 5 ¶ 6.

10 *CPNI Order* at 56 ¶ 71.

> use CPNI, within the framework of the total service approach, in order to market CPE.[11]

Importantly, Section 222(c)(1)(B) states that carriers may use CPNI in connection with "services necessary to, or used in, the provision of such telecommunications services, *including the publishing of directories*."[12] Strictly speaking, the publishing of directories is not a "service," but Congress recognized that directories can be used "to facilitate call completion."[13] If, as Congress has determined, carriers may use CPNI in connection with directories, clearly it expects that CMRS providers may use CPNI in connection with handsets. CMRS handsets are more critical to call completion than directories; while one can complete a call without a directory, a CMRS customer cannot complete any calls without a handset.

Moreover, the Commission's decision regarding CPE cannot be squared with its holding regarding inside wiring.[14] If the installation and maintenance of inside wiring (equipment) is deemed to be a "service" within Section 222(c)(1)(B), clearly the provision of CMRS handsets is a service as well. In this regard, virtually any wiring can be used to transport landline telecommunications. With CMRS, in contrast, the customer must obtain the "correct" handset (in terms of frequency and air interfaces), and the customer's CMRS provider must program the handset for it and the customer's service to work. Indeed, as CTIA as pointed out,

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11 *See CPNI Order* at 62 ¶ 77. PrimeCo cannot agree with the Commission's observation that "the record in this proceeding does not indicate whether, as a matter of policy, carriers should be prohibited from marketing CPE under the total services approach." *Id.* In fact, the record applicable to the CMRS market conclusively established that the public interest compels including handsets within the total services approach.

12 47 U.S.C. § 222(c)(1)(B) (emphasis added).

13 *CPNI Order* at 59 ¶ 74.

14 *See CPNI Order* at 62-64 ¶¶ 78-80.

handsets are an integral part of a CMRS provider's Title III radio service license and, consequently, constitute a core component of a provider's service.[15]

The Commission examined customer expectations in ruling that landline carriers may use CPNI in the marketing of inside wiring:

> We further believe that our conclusion is fully consistent with customer expectation, and thereby furthers the statutory principles of customer control and convenience embodied in Section 222. . . . *We believe [inside wiring] services represent core carrier offerings that are both necessary to and used in the provision of existing service, which is precisely the purpose for which both Congress intended, and we believe customers expect that CPNI be used.*[16]

However, the Commission did not examine customer expectations with respect to CMRS handsets.[17] PrimeCo submits that had the Commission done so, it would have concluded that, from the perspective of CMRS subscribers, handsets represent "core carrier offerings that are both necessary to and used in the provision of existing service, which is precisely the purpose for which both Congress intended, and we believe customers expect that CPNI be used."

2. Voice Mail and Other Information Services. Many consumers find voice mail to be an essential component of their mobility service because voice mail enables them to continue to receive telecommunications when, for whatever reason (*e.g.*, to preserve battery life; to avoid interruptions), the customer turns off his or her handset.

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15 *See* CTIA, Request for Deferral and Clarification, CC Docket No. 96-115, at 31-33 (April 24, 1998).

16 *CPNI Order* at 64 ¶ 80 (emphasis added).

17 Although the Commission rejected in a single sentence "suggestions that restrictions on CPNI sharing in the context of CPE and information services would be contrary to customer expectations," the record upon which the Commission based its summary conclusion was limited to the landline market. *Compare CPNI Order* at 60 ¶ 76 *with* 60 n. 287.

The Commission nonetheless concluded that voice mail is "'not necessary to, or used in, the provision of' any telecommunications service", and thus CPNI restrictions apply.[18] The Commission appeared to base its conclusion on that the fact that in the landline market, information services "are provided to consumers independently of their telecommunications service [and, consequently] neither are used by the carrier nor necessary to the provision of such carrier's service."[19]

Whatever may be the situation with respect to the landline market, in the CMRS market information services are *not* generally provided "independently" of the CMRS service. More fundamentally, it defies common sense to conclude that a service like voice mail is not "used in" a telecommunications service. As stated above, the fact is that CMRS customers perceive voice mail and other information services to be a critical component of their mobility services. Certainly, for many CMRS subscribers, voice mail is viewed as a more useful and more important feature than the availability of published directories, which Congress has expressly determined may be marketed with CPNI.

Finally, the Commission's decision regarding handsets and CMRS information services will in certain cases hamper the ability of CMRS providers to continue to offer consumers the benefits of integrated service offerings which, in turn, will impede the rapid growth of CMRS. The Commission has noted that one-stop shopping in the CMRS market "promotes efficiency and avoids consumer confusion":

> We believe that the benefits to consumers of "one-stop shopping are substantial . . . The ability of a customer, especially a customer

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18 *CPNI Order* at 57 ¶ 72.

19 *Id.*

> who has little or infrequent contact with service providers, to have one point of contact with a provider of multiple services is efficient and avoids the customer confusion that would result from having to contact various departments within an integrated, multi-service telecommunications company.[20]

The Commission stated in its *CPNI Order* that "CPNI is not required for one-stop shopping" and that its interpretation of Section 222 "does not prohibit carriers from bundling services that they are otherwise able to bundle under the 1996 Act, or from marketing integrated service offerings."[21] This statement is correct from the strictly legal perspective. But on a more practical level, the Commission's decision regarding handsets and CMRS information services will have a negative effect in the CMRS market, to the detriment of consumers. Indeed, the Commission itself has recognized that precluding carriers from using CPNI will effectively prevent them from giving consumers the benefits of one-stop shopping:

> With integrated marketing and sales, [a] service representative receiving a call can also offer consumers additional choices that may better suit their needs, including combinations of basic and enhanced services. For instance, a customer service representative might suggest a voice mail service to record messages when the customer's line is busy as a more economical alternative to ordering additional lines. If a prior [CPNI] authorization rule were applied to all customers, only the largest business customers would be able to enjoy the one-stop-shopping benefits of the integrated marketing of basic and enhanced services.[22]

CMRS providers like PrimeCo have developed a diverse set of packaged offerings. Tying the hands of carriers and inhibiting their ability to treat their customers as

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20 *McCaw/AT&T Transfer of Control Reconsideration Order,* 10 FCC Rcd 11786, 11795-96 ¶¶ 15-16 (1995). *See also McCaw/AT&T Transfer of Control,* 9 FCC Rcd 5836, 5886 ¶ 83 (1994); *Computer III Remand Proceedings: BOC Safeguards*, 6 FCC Rcd 7571, 7610 ¶ 94 (1991); *BOC CPE Relief Order*, 2 FCC Rcd 143, 147-48 ¶¶ 29, 31 (1987).

21 *CPNI Order* at 61 ¶76.

22 *Computer III BOC Safeguards Order,* 6 FCC Rcd 7571, 7610 ¶ 85 (1991).

individuals does not promote competition, does not protect consumer privacy interests, and certainly does not facilitate the interests of consumers in learning about the package of services that best meets their individual mobility needs.

B. The "Win Back" Prohibition Will Stifle Competition to the Detriment of Consumers and the Overarching Goal of the 1996 Act to Lower Prices

In fiercely competitive markets as CMRS has become, consumers shop among carriers to ensure they are receiving the set of services they need at the best price.[23] Indeed, from the perspective of consumers, the ideal place to be is in the middle of a "bidding war" between two or more service providers, where carriers are competing for the customer's business.[24] Notwithstanding these pro-competitive benefits, the Commission adopted Rule 64.2005(b)(3), which prohibits a carrier from using "a former customer's CPNI to regain the business of the customer who has switched to another service provider."[25] The *CPNI Order* contains little discussion of this rule, which is not surprising as this "win back" prohibition issue was neither mentioned in the *Notice of Proposed Rulemaking* nor addressed in the pleadings.[26]

PrimeCo cannot agree that use of CPNI to "win back" a former customer is "not statutorily permitted" under Section 222.[27] It defies common sense to suggest that an Act

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23 This shopping is reflected by the industry's substantial "churn" rate.

24 A recent newspaper article documents the benefits of this direct, "head-to-head" competition. *See* Elizabeth Jensen, "Yakking It Up: For Wireless Services Talk Gets Far Cheaper as Competition Rages," *Wall Street Journal,* April 27, 1998, at A1.

25 47 U.S.C. § 64.2005(b)(3).

26 It appears the Commission decided to address this issue based on an *ex parte* contact made on November 17, 1997. *See CPNI Order* at 66 n.317.

27 *CPNI Order* at 67 ¶ 85.

adopted to establish a "pro-competitive, de-regulatory national policy" prohibits consumers from being placed in a situation where they can directly benefit from lower prices. Indeed, Section 222(d)(1) expressly authorizes carriers to use CPNI "to initiate [or] render . . . telecommunications services." A carrier's use of CPNI to develop a "win back" proposal to a former customer clearly is done to "render" a telecommunications service.[28]

CMRS providers have used CPNI in the "win back" situation for one purpose: to develop a final service offer to a former customer in an attempt to persuade the customer to return to the carrier. Customers will select this new offer only if the original carrier can offer a "better deal" than their existing carrier. Simply put, the "win back" prohibition deprives consumers of the benefits of competition and meaningful choice. And it is not credible to conclude that, because of privacy interests, consumers do not want to be told of the opportunity to receive a better deal.

One thing is clear: the rule as written is overbroad because it appears to prohibit use of CPNI even where the former customer had given his or her approval to use CPNI. Section 222 unquestionably permits carriers to use CPNI with customer approval, and Commission rules specify approval is "valid until the customer affirmatively revokes or limits such approval."[29] It would therefore be inconsistent with Section 222 to prohibit carriers from using CPNI in attempting to regain a former customer who had previously granted approval to use CPNI.

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28 Render is defined to mean "to furnish for consideration, approval, or information." *Merriam Webster's Collegiate Dictionary* (10th Ed., 1996).

29 47 C.F.R. § 64.2007(f)(2)(ix).

II. Alternatively, the Commission Should Forbear from Applying the Handset/ Information Service and Win Back Prohibition Rules to CMRS Providers

Should the Commission decline to reconsider its *CPNI Order* as discussed above, then PrimeCo urges the Commission to exercise its authority under Sections 10 and 332 of the Communications Act to forbear from applying new Rules 64.2005(b)(1) and (b)(3) to CMRS providers.

Congress and the Commission have long acknowledged that traditional command-and-control economic regulation under Title II of the Communications Act, designed for landline monopolies, is not appropriate for the competitive CMRS market. To that end, in 1993 Congress authorized the Commission to forbear from applying certain provisions of Title II to CMRS providers.[30] The Commission subsequently concluded that in deciding whether to impose regulatory obligations on CMRS providers under Title II, it "must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices":

> In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course.[31]

The Telecommunications Act of 1996 expanded the Commission's forbearance authority. Specifically, new Section 10(a) of the Communications Act *requires* the Commission to forbear from applying any regulation to a class of telecommunications carriers if:

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30 *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392-93 (1993), *codified at* 47 U.S.C. § 332(c)(1).

31 *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services,* 9 FCC Rcd 1411, 1419 (1994) ("*CMRS Second Report*").

1. Enforcement of such regulation is not necessary to ensure that a carrier's practices are just and reasonable;

2. Enforcement of such regulation is not necessary for the protection of consumers; and

3. Forbearance from applying such regulation is consistent with the public interest.[32]

PrimeCo demonstrates below that new Section 10 compels the Commission to forbear from imposing Rules 64.2005(b)(1) and (b)(3) on CMRS carriers, if such rules are in fact found applicable to CMRS carriers.

A. The Commission Should Forbear from Applying Rule 64.2005(b)(1) to CMRS Providers

Rule 64.2005(b)(1) prohibits carriers from using CPNI in the marketing of CPE and information services. Forbearance of this Rule as applied to the CMRS industry is appropriate under the three-pronged Section 10 forbearance standard.

1. Section 10(a)(1). Application of Rule 64.2005(b)(1) is not necessary to protect the privacy interests of CMRS subscribers because of the competitive nature of the CMRS market. The CMRS market is fiercely competitive; in many markets, there are now five or more facilities-based CMRS carriers providing mobile telephony service. Indeed, in its most recent CMRS Annual Report, the Commission advised Congress that "competition in mobile telephony and other services is healthy" and that, as a result of this competition, "prices have been falling

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32 47 U.S.C. § 160(a)(1)-(3). Although the forbearance standards under Sections 10 and 332 are almost identical, Section 10 differs from Section 332 in that it is not permissive. In other words, Section 10 *requires* the Commission to forbear from enforcing any statutory or regulatory provision if the stated criteria are met.

and service offerings have become more diverse."[33] Simply put, CMRS carriers are more strongly constrained by competitive market forces then ever before. It is, therefore, difficult to comprehend why rules deemed unnecessary in the past, when the CMRS market was *less* competitive, can be justified now that the market is fiercely competitive.

The rigors of the competitive CMRS marketplace eliminate opportunities and incentives for CMRS carriers to act in an unreasonable or anticompetitive manner with regard to the use of CPNI. A CMRS customer has a *voluntary* business relationship with a given carrier and can easily choose to give its business to another carrier if a given provider does a poor job of maintaining customer confidentiality. As the Commission itself has noted:

> [C]arrier policies concerning the protection of personal information may very well factor into the customer's section of their carrier.[34]

The ease with which CMRS subscribers can (and do) switch serving carriers gives CMRS carriers strong incentives to use CPNI in a responsible manner, especially given the difficulty and expense of attracting and maintaining customers. The very nature of the competitive CMRS market ensures that customer privacy interests will be protected.

2. Section 10(a)(2). Rule 54.2005(b)(1) is not necessary to protect CMRS consumers. Section 222 was enacted largely to protect the privacy rights of consumers. However, use of CPNI to market CMRS handsets and/or information services such as voice mail does not implicate consumer privacy interests. This is confirmed by the fact that CMRS providers have always used CPNI in the marketing of handsets and CMRS information services,

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33 *Wireless Telecommunications Action*, "FCC Adopts Third Annual Report to Congress on State of CMRS Competition," Report No. WT 98-13 (May 14, 1998).

34 *CPNI Order* at 50 n.233.

yet consumers had not complained that their privacy interests were being misused. To the contrary, and as discussed in the preceding section, CMRS customers expect that carriers will appraise them of new capabilities, service packages or prices which will enhance their mobility needs — regardless of the legal classifications which regulators may attach to different components of a mobility package. From the perspective of consumers, all of the offerings of a CMRS provider — whether deemed "basic telecommunications," "adjunct-to-basic," "equipment," or "information services" — are or have the potential to be an important component of a service package necessary to meet one's mobility needs. Thus, it is application of Rule 64.2005(b)(1) to the CMRS industry that would undermine consumer interests.

3. Section 10(a)(3). Permitting CMRS carriers to use CPNI to market handsets, voice mail and other information services is "consistent with the public interest." In fact, it is application of Rule 64.2005(b)(1) to the CMRS industry that would harm the public interest. As discussed above, CMRS carriers have long used CPNI to develop integrated service packages (which include handsets and information services) and to match particular packages to particular customers. While the Rule 64.2005(b)(1) prohibition does not prevent carriers from continuing to develop bundled packages, it does prevent them from identifying the package that may best suit a customer's need. In short, the rule precludes CMRS providers from treating their customers as individuals.

Moreover, in determining whether forbearance is consistent with the public interest, the Commission has stated that it must "consider whether forbearance would promote competitive market conditions, including the extent to which such forbearance will enhance

competition among providers of telecommunications services."[35] Application of Rule 64.2005(b)(1) would inhibit the benefits of competition because the rule would preclude carriers from advising customers of services and packages which they may find more useful or which may lower the prices they pay for services.

B. The Commission Should Forbear from Applying Rule 64.2005(b)(3) to CMRS Providers

Rule 64.2005(b)(3) prohibits carriers from using CPNI to identify a package it can offer to a subscriber who has chosen to use the services of a competitor. Forbearance of this Rule as applied to the CMRS industry also is appropriate under the three-pronged Section 10 forbearance standard.

1. Section 10(a)(1). Application of the "win back" prohibition rule is not necessary to ensure that a carrier's practices are just and reasonable. As discussed above, CMRS providers use CPNI in the win back context for one purpose and one purpose only: to identify the service package that may attract a subscriber to return to the offering carrier. Thus, carriers use CPNI in this context to give consumers the opportunity to receive a better deal than they have today. Under no circumstances can it be said that such offers constitutes an unjust or unreasonable practice. Indeed, this practice intensifies competition among service providers.

2. Section 10(a)(2). Nor does the win back prohibition rule protect consumers; it simply hampers consumers from learning of new packages which they may find more attractive. Consumers welcome being told that they may be able to obtain a better deal. However, as a practical matter, carriers cannot best tailor a "best deal" suited for a particular person without access that person's CPNI.

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[35] 47 U.S.C. § 160(b).

3. Section 10(a)(3). Application of Rule 64.2005(b)(3) that would disserve the public interest. In telecommunications markets, the public interest is served by the promotion of competition. The purpose of competition is to provide consumers increased choices, so they can realize lower prices or a better service. In the win back context, CMRS provides want to continue to use CPNI to give consumers increased choices in the hope they can offer a service package consumers will find attractive.

The CMRS market has been so successful largely because carriers have retained the flexibility to devise service packages which meet the diverse needs of consumers. While the CPNI rules do not preclude carriers from developing many different packages, they will often preclude carriers from identifying the particular packages which a particular consumer may uniquely find most attractive and beneficial.

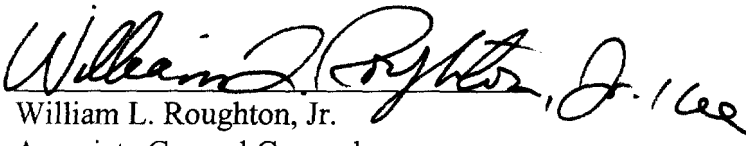
Consumer privacy interests are not adversely implicated when CMRS providers use CPNI in marketing handsets and CMRS information services, or in identifying a final "win back" offer. The CMRS industry has used CPNI in these situations since the inception of the industry over a decade ago — *without* consumer complaints of misuse. In this regard, there is no indication in the language or legislative history of Section 222 suggesting that Congress intended to dismantle these highly successful CMRS marketing programs.

Conclusion

For the foregoing reasons, PrimeCo respectfully requests that the Commission reconsider Rules 64.2005(b)(1) and (b)(3) as applied to CMRS providers. Alternatively, the Commission should forbear from applying these Rules to CMRS providers.

Respectfully submitted,

PRIMECO PERSONAL COMMUNICATIONS, L.P.

By: 
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CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that I have on this 26th day of May, 1998 caused a copy of the foregoing Petition for Limited Reconsideration and/or Forbearance of PrimeCo Personal Communications, L.P. to be served by first class U.S. mail, postage prepaid, to the following:

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